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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

David Allen Harbour,

Defendant.

Case No. 2:19-cr-00898-DLR (DMF)

**EMERGENCY MOTION TO
DISMISS COUNT(S) 1; 13-19**

(Oral Argument Requested)

Defendant David Allen Harbour (Defendant), by and through undersigned counsel, files this Motion to Dismiss Counts 1 and Counts 13-19. These Counts pertain specifically to R.T. (Richard Turasky), an individual identified as a victim by the government.

BACKGROUND

The government filed its motion *in limine* to determine the admissibility of evidence on December 20, 2022 (Doc. 485). In the motion, the government stated that “the United States has learned that Harbour’s efforts at tampering with witness Richard Turasky were misguided...But in the case of Turasky, his investment with Harbour

1 wasn't really his money. The actual source of that money belonged to a Scott Prater.
 2 Prater is expected to testify that he was defrauded by both Harbour and Turasky." Doc.
 3 485 pg. 23 ln. 4-5; 9-11. Count 1 of the Second Superseding Indictment is for wire fraud
 4 of \$500,000, which at the time of the indictment, was money associated with Turasky.
 5 Counts 13-19 contain the transactional money laundering counts for the same funds.
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7 In Harbour's Consolidated Response to the Government's Motion (Doc. 509),
 8 Defendant pointed out what certainly seemed to be the abandonment of Turasky as a
 9 victim and the substitution of Scott Prater as a victim instead. The Court identified this
 10 notation as a motion to dismiss tucked into the response and denied the motion without
 11 prejudice during oral argument on January 17, 2023, instructing counsel to file a true
 12 motion to dismiss the counts, if we wished to do so.
 13

14 APPLICABLE LAW

15 "It has been the rule that after an indictment has been returned its charges may not
 16 be broadened through amendment except by the grand jury itself." *Stirone v. United*
 17 *States*, 361 U.S. 212, 215–16, 80 S. Ct. 270, 272, 4 L. Ed. 2d 252 (1960) *citing to Ex*
 18 *Parte Brian*, 121 U.S. 1, 7 S.Ct. 781, 30 L.ed. 849 (1887). The well settled law in the
 19 United States is that once an indictment has been returned, neither judges nor prosecutors
 20 are able to change the charging part of the indictment. *See United States v. Ward*, 747
 21 F.3d 1184, 1189 (9th Cir. 2014) *quoting United States v. Leichtnam*, 948 F.2d 370, 375-
 22 76 (7th Cir. 1991) "It is the exclusive prerogative of the grand jury finally to determine the
 23 charges, and once it has done so neither a prosecutor nor a judge can change the charging
 24 part of an indictment to suit [his or her] own notions of what it ought to have been, or
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1 what the grand jury would probably have made it if their attention had been called to
 2 suggested changes.” An amendment to the body of an indictment violates a defendants
 3 Fifth Amendment rights and renders any convictions based upon the changes void.
 4 *United States v. Dawson*, 516 F.2d 796, 801 (9th Cir. 1975). Amendments to indictments
 5 are only permitted as to form or technicality, such as typographical errors. *Id.* Other
 6 examples of permissible amendments include correcting clerical mistakes or eliminated
 7 surplusage from the text of an indictment. *United States v. Stewart Clinical Lab’y, Inc.*,
 8 652 F.2d 804, 807 (9th Cir. 1981). However, portions may be removed from an
 9 indictment and withdrawn from the jury provided nothing is added to the indictment.
 10 *Dawson*, 516 F.2d at 801. Indictments may not be amended by changing the offense
 11 charged to conform with the proof expected to be elicited at trial; such amendments that
 12 lead to a conviction constitute a per se reversible error. *Stewart Clinical Lab’y, Inc.*, 652
 13 F.2d at 807. A defendant may not be convicted of an offense different from that
 14 specifically charged by the grand jury. *Id.*

18 ARGUMENT

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 20 The government has decided to remove Turasky as a victim and instead identify
 21 him as a co-conspirator. Counts and victims may be withdrawn. *Dawson*, 516, F.2d at
 22 801. Indeed, C.W., a so-called “investor victim” in the original indictment, was
 23 withdrawn. However, it is not permissible for the government to add a different victim
 24 and an entirely new origin story to \$500,000 in charges without the grand jury.

25
 26 The 9th Circuit has delineated two areas of inconsistency for the purposes of an
 27 indictment: a constructive amendment and a variance. *United States v. Von Stoll*, 726
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1 F.2d 584, 586 (9th Cir. 1984). “An *amendment* of the indictment occurs when the
2 charging terms of the indictment are altered, either literally or in effect, by the prosecutor
3 or a court after the grand jury has last passed upon them. A *variance* occurs when the
4 charging terms of the indictment are left unaltered, but the evidence offered at trial
5 proves facts materially different from those alleged in the indictment.” *Id. citing to*
6 *United States v. Cusmano*, 659 F.2d 714, 718 (6th Cir.1981). Constructive amendments
7 normally involve a complex of facts while a variance occurs where the indictment and the
8 proof involve only a single, though materially different sets of facts. *United States v.*
9 *Adamson*, 291 F.3d 606, 615 (9th Cir. 2002), *holding modified by United States v.*
10 *Larson*, 495 F.3d 1094 (9th Cir. 2007). However, even some variances may be fatal when
11 it affects the substantial rights of a defendant. *Id.* at 615-616, *citing to United States*
12 *v. Tsinhnahjinnie*, 112 F.3d 988, 990–92 (9th Cir.1997) (finding fatal variance
13 where indictment charged defendant with sexual abuse of child occurring on Indian
14 reservation during summer of 1992, but proof fluctuated between placing the abuse at
15 place and time in indictment and placing it off reservation in 1994); *Jeffers v. United*
16 *States*, 392 F.2d 749, 752–53 (9th Cir.1968) (finding fatal variance where indictment
17 alleged that money solicited by religious group was used for non-religious purposes, but
18 evidence failed to prove that use was non-religious, instead showing that use was merely
19 contrary to representations made when money was collected).

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21 As for constructive amendments: “There are two types of constructive
22 amendments: first, where “there is a complex of facts [presented at trial] distinctly
23 different from those set forth in the charging instrument, and second, where the crime
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1 charged [in the indictment] was substantially altered at trial, so that it was impossible to
2 know whether the grand jury would have indicted for the crime actually proved.” *United*
3 *States v. Davis*, 854 F.3d 601, 603 (9th Cir. 2017).

4
5 The situation for Harbour is a constructive amendment of the second category; the
6 crime charged in the indictment for count(s) 1 and 13-19 were specifically directed at
7 conduct with Turasky. Now, the government has changed the victim to Scott Prater, a
8 previously unknown individual. The substitution of Turasky into Prater is not merely a
9 substitution of names, but of evidence. The government now contends that Turasky and
10 Harbour were co-conspirators who defrauded Prater, which is a substantial alteration of
11 the evidence from what was presented to the grand jury versus what the trial would be.

12
13 First, there is no conspiracy charge in the indictment and it is far too late to add
14 one. The 5-year SOL for conspiracy ran over 3 years ago. Second Scott Prater was not
15 included in the Bill of Particulars.

16
17 As an example of a constructive amendment involving individuals, in *Howard*, the
18 defendant appealed his denial of petition for a charging error in the instruction of the jury
19 during trial. *Howard v. Dagget*, 526 F.2d 1388, 1388 (9th Cir. 1975). Two women were
20 named in his indictment for aiding prostitution, but evidence was admitted at trial that
21 dealt with several women not named in the indictment. *Id.* at 1390. The trial court
22 provided a supplemental instruction that, in effect, permitted the jury to convict the
23 defendant on the basis of the other women that were not the original named women in the
24 indictment. *Id.* The Court of Appeals found that this instruction was improper, as the
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1 evidence of other individuals allowed the jury to convict on a charge not brought by the
2 grand jury. *Id.*

3 In the alternative, even if this Court found the change to the indictment was not a
4 constructive amendment but rather a variance, the variance is still fatal. The Defense,
5 having been provided with what the government considered a lot of evidence pointing to
6 Turasky as a victim of Harbour had been operating under the impression that we would
7 be confronting Turasky as a victim witness, and prepared its defense as such, only to now
8 be confronted with an entirely new case. This case is not charged in the Second
9 Superseding Indictment and it was not disclosed in the Bill of Particulars, one of whose
10 purposes, in fact, is to prevent just this sort of thing from occurring.

13 CONCLUSION

14 The government has made it absolutely clear that Richard Turasky is no longer a
15 victim in this case. The government is not permitted to amend the indictment without the
16 intervention of the grand jury. This is not a civil case where, under Rule 15, F.R.Civ.P.,
17 an amended complaint might relate back to the original date of filing and avoid the
18 implications of the SOL. Evidence concerning Scott Prater and that the \$500,000 was
19 associated with him and that, therefore, he and not Turasky was the victim cannot
20 possibly be admitted in this case. Therefore, the government having made no secret that
21 it regards Harbour and Turasky as co-conspirators to defraud Prate, Counts 1 and 13-19
22 must be dismissed.
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1 RESPECTFULLY SUBMITTED this 20th day of January 2023.

2 CHRISTIAN DICHTER & SLUGA, P.C.

3
4 By: /s/ Stephen M. Dichter

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10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on January 20, 2023, I electronically transmitted the attached
12 document to the Clerk's Office using the CM/ECF system for filing and for transmittal
13 of Notice of Electronic Filing to the following CM/ECF registrants:

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